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Nos. 94-805, 94-806, and 94-988

In The

Supreme Court of the United States

October Term, 1995

GEORGE W. BUSH, GOVERNOR OF TEXAS, ET AL.,

Appellants,

v.

AL VERA, ET AL.,

Appellees.

REV. WILLIAM LAWSON, ET AL.,

Appellants,

v.

AL VERA, ET AL.,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

v.

AL VERA, ET AL.,

Appellees.

On Appeal From The United States District Court
For The Southern District Of Texas

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INSTITUTE FOR JUSTICE
*WILLIAM H. MELLOR III
CLINT BOLICK
SCOTT G. BULLOCK
1001 Pennsylvania Avenue, NW
Suite 200 South
Washington, DC 20004
(202) 457-4240
Counsel for Amicus Curiae

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest legal center committed to defending and strengthening essential foundations of a free society: private property rights, individual liberty and the free exchange of ideas. The instant case involves the power of the state to make decisions which depend upon racial classifications.

Although the question in the case before this Court concerns the constitutional legitimacy of race-based congressional districting, the issues presented involve both the legal standards contained in the Voting Rights Act and fundamental questions about American society, its openness to racial change, and the nature of democratic representation.

This brief was prepared with the assistance of Professor Abigail Thernstrom, one of the nation's foremost experts on the history and jurisprudence of the Voting Rights Act.

The Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

CONDENSED STATEMENT OF FACTS

The complete statement of facts and the history of this litigation has already been presented by both parties. This brief summary is designed to highlight those facts that we believe are critical to the proper understanding and disposition of the case.

A congressional districting plan adopted by the state of Texas following the 1990 census contained 30 districts, three of which are at issue in this case. One is majority-Hispanic and two are majority black; all three were drawn with the explicit purpose of creating safe minority constituencies, and were thus subsequently successfully challenged as unconstitutional racial gerrymanders – impermissible racial classifications. *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994)

As the district court noted, Texas drew the Congressional boundary lines "with nearly exact knowledge of the racial makeup of every inhabited block . . . [and] repeatedly segregated those populations by race. . . . " *Vera*, 861 F. Supp. at 1309. Nevertheless, the state defended the plan as reasonable, resting on such traditional Texas districting criteria as incumbency protection, race-conscious but not race-driven. In fact, even if viewed as a racial classification, subject to strict scrutiny, the State argued, the districting plan could meet the test; it was narrowly tailored to remedy past discrimination and to further a compelling state interest in complying with the Voting Rights Act. These are the main arguments, rejected by the court below, that Texas now reiterates on appeal.

SUMMARY OF ARGUMENT

We take as our starting point that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 290-91 (1978)

(Opinion of Powell, J.). Under this Court's jurisprudence, any use of racial classifications is subject to strict scrutiny and must be narrowly tailored to a compelling governmental purpose. *Shaw v. Reno*, 113 S.Ct. 2816, 2825 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995); *Miller v. Johnson*, 115 S.Ct. 2475 (1995).

The principal compelling governmental purpose asserted by appellants is compliance with the Voting Rights Act. We offer this brief mainly to address the vital and dispositive issue of whether the Voting Rights Act required the drawing of Districts 18, 29, and 30. The Act was designed to ensure access to the ballot and an equal opportunity for electoral representation. It does not require racial or ethnic gerrymandering to promote the proportional representation of minority groups. In fact, such efforts are themselves destructive of our nation's social fabric and contrary to the ideals embodied in our civil rights laws. For all these reasons, racial proportionality as the end to which government action is directed, far from representing a compelling interest, is both misguided and impermissible.

ARGUMENT

I. THE VOTING RIGHTS ACT DOES NOT REQUIRE THAT TEXAS DRAW THREE MAJORITY-MINORITY DISTRICTS. THEREFORE, THE NEED TO COMPLY WITH THE STATUTE DOES NOT CONSTITUTE A COMPELLING STATE INTEREST JUSTIFYING THE RACIAL CLASSIFICATION IN THIS CASE.

Constitutional and statutory questions are intertwined in this case; the two cannot be separated. Appellees argue that the race-conscious districting in which Texas engaged constitutes a racial classification in violation of plaintiffs' equal protection rights. Appellants reply that if Districts 18, 29 and 30 are indeed racial classifications, the state's line-drawing meets the test of strict scrutiny; the districts' contours were drawn to further a compelling state interest in complying with Sections 2 and 5 of the Voting Rights Act.

Two questions are thus before this Court: What does the Fourteenth Amendment allow, and what does the Voting Rights Act demand? If the congressional district lines were drawn on the basis of racial classification, this Court cannot resolve the Fourteenth Amendment question without deciding what the Voting Rights Act requires. Texas has no compelling interest in complying with erroneously interpreted law.

A. Districts 18, 29, and 30 are clearly racial classifications; the segregation of black and Hispanic voters is their point.

"Districts 18, 29, and 30 were all designed with highly irregular boundaries . . . [which] function primarily to include sufficient numbers of the favored minority groups and to exclude the disfavored groups so as to assure election of one of the favored groups' members. If these districts – tortuously constructed block-by-block . . . to satisfy the desired racial goal – are constitutional, then the State could more easily hand each voter a racial identification card and allow him to participate in racially separate elections," the district court concluded. *Vera*, 861 F. Supp. at 1345.

Racially separate elections, indirectly achieved by means of race-driven districting, were the point of the Texas lines. The district court called the elections within these majority-minority districts the equivalent of white primaries. *Id.* The State and other appellants argue that it was not race but the desire to protect incumbents that determined the contours. *See, e.g.*, Brief for the United States at 4-5, 43-44. But, if so, it is odd that, as the district court put it, "racial data were an omnipresent ingredient in the redistricting process." *Vera*, 861 F. Supp. at 1336. The REDAPPL software superimposed block-by-block racial census statistics upon local maps; the system conveyed racial and ethnic data every time a line was drawn. *Id.* at 1309, 1318, 1319, 1336. That was the information on which the mapmakers were primarily focused.

Appellants extend the incumbency protection argument in a novel and telling way. The State was protecting

both actual and *potential* incumbents, they argue. The protected category included not only sitting members of Congress but candidates likely to occupy secure congressional seats if the districting lines were favorably drawn. They call this latter group "functional incumbents," a category that (at the time) included State Sen. Eddie Bernice Johnson. Brief for the State of Texas Brief at 5 n.1. But that point further substantiates appellees' case. For minority members of the state legislature – and only for them – the state was willing to provide precisely the districts in which they wanted to run. Black and Hispanic state legislators had special status; they alone were entitled to designer districts made to order for them. Those districts, fashioned as safe minority seats, were inevitably race-driven; race determined their contours.

Although all three districts were explicitly designed to be safe minority seats, the state argues that the challenged districts are "competitive" – open to white and minority candidacies – and thus not segregated. State of Texas Brief at 38. That is correct if the point is that these are districts in which the population is racially mixed; they contain substantial numbers of whites. But "competitive" they are not, by any sensible definition. Whites are mere "filler people" in such districts, two proponents of racial gerrymanders have acknowledged. Aleinikoff and Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 630-31 (1993). They are included so as not to waste minority

ballots by excessive "packing."[1] White ballots are expected to carry no significant political weight.

That is, in deliberately-fashioned majority-minority districts in Texas and elsewhere, only the black and Hispanic ballots are meant to count. These are districts reserved for minority candidates. In effect, they have a sign posted on them: no white candidates need apply. Indeed, in 1992 several members of the U.S. House of Representatives chose to retire or move to other districts under pressure from black leaders to let blacks run racially uncontested races in newly created majority-black districts. Lublin, *Gerrymander for Justice? Racial Redistricting and Black and Latino Representation* 48, 90 (unpublished manuscript) (available at Harvard University Archives) (1994). Briefs for appellants repeatedly refer to majority-minority constituencies as black or Hispanic "opportunity districts." *See, e.g.*, Brief for the State of Texas at 25 ("Texas intentionally maintained CD 18 as an African-American opportunity district"). The phrase is Orwellian. These are in fact "results" districts. Their point is to guarantee not opportunity, but outcome.

Thus, there should be no dispute that Districts 18, 29, and 30 constitute racial classifications. Not only because they look bizarre, which they do, but also because the classification of voters by race is precisely their aim. Race has determined their contours. They are intentionally

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[1] Whites in majority-black districts, the authors write, "should not be expected to compete in any genuine sense for electoral representation" in those districts, "lest they undo the preference given to the specified minority group." *Id.* at 631.

race-based – for a goal their proponents believe in: increased black and Hispanic officeholding.

B. These majority-minority districts were not racial classifications demanded by the law. The Voting Rights Act does not require states to maximize black or Hispanic officeholding by means of race-based districting.

Appellants argue that if Districts 18, 29, and 30 are racial classifications, the State's line-drawing meets the test of strict scrutiny; the districts' contours were drawn to further a compelling state interest in complying with Sections 2 and 5 of the Voting Rights Act.

Neither Section 2 nor Section 5 of the Voting Rights Act required the drawing of three majority-minority congressional districts. The State misconstrued the statute. It had a compelling interest in complying with the law, but only as validly interpreted and applied.[2]

1. Section 2 is standard remedial legislation; it creates no entitlement to even one safe black or Hispanic district.

Appellants' briefs all argue that the Voting Rights Act required Texas to draw the challenged districts. They focus particularly on the demands of Section 2. "The State drew Districts 18, 29, and 30 in order to comply with Section 2 of the Voting Rights Act." Brief for the United

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[2] *See Shaw*, at 2830 (states have an interest in complying with laws that are "constitutionally valid as interpreted and applied").

States at 19. A court would most likely have required the same number of majority-minority districts, the *Amicus* Brief for the Democratic National Committee (at 20) declares. But what a court would have demanded had plaintiffs prevailed in a Section 2 suit is, of course, irrelevant. Texas had no obligation to provide a remedy for an unproven wrong. Section 2 is standard remedial legislation. A state that strings together black or Hispanic residential pockets in order to create majority-minority districts "is akin to a manufacturer paying punitive damages to potential purchasers of its product prior to anyone suffering an injury or establishing a defect in the product." Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights*, 26 Rutgers Law Journal (forthcoming 1995). Before minority voters are entitled to even one safe black or Hispanic constituency, plaintiffs must establish a violation of their statutory right to an electoral process open to minority political aspirations.

A key argument of the United States is thus flatly wrong. Texas, appellants state, had a compelling interest in creating safe minority constituencies if it had a "firm basis" for believing plaintiffs might prevail in a Section 2 suit. Brief for the United States at 14. The assertion has no firm basis in the law. The residential concentration of a minority population, coupled with political cohesion, white bloc voting, and the risk of disproportionately low minority officeholding – assuming, *arguendo*, that these facts had been established in the Texas context – have no bearing on the State's districting obligations.

Undoubtedly, the State drew the challenged districts in part to forestall the possibility of a future Section 2 suit. Litigation is costly and disruptive. Redistricting is a politically complex and laborious process, and to design a plan that is not litigation-proof may be a waste of extensive political effort. That Texas wanted to play it safe – that the State wanted absolutely sure protection against a Section 2 challenge – is understandable, but that desire is not a compelling state interest that justifies a racial classification.

2. Whatever the relevance of Section 2 to the redistricting process, that provision guarantees only equal electoral access, not "racially fair" outcomes.

Appellants misconstrue the statute in a second sense. They erroneously assume that districting schemes that provide for a disproportionately low number of safe minority seats will always be found to violate Section 2, if plaintiffs choose to bring suit subsequent to the enactment of a plan.

The provision, in fact, sets no standard for the proper number of majority-minority constituencies. As amended in 1982, Section 2 demands that redistricting plans (and other electoral arrangements) provide minority voters with an equal opportunity to participate in the political process and to elect representatives of their choice.

That language was lifted directly from two pre-1982 constitutional decisions. In *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and *White v. Regester*, 403 U.S. 124 (1973), this Court had directed trial courts to assess the electoral

environment – the setting in which the voting took place. Judges had thus been asked to distinguish the failure of minority voters to elect candidates of their choice for reasons of race from normal electoral defeat – that to which every group, however defined, was vulnerable. It had been a very tall order. What were the criteria that distinguished the one setting from the other?

It was not clear and it could not be. Unequal electoral opportunity was an elusive concept, as Justice Frankfurter observed in 1962. *Baker v. Carr*, 369 U.S. 186 (1962) (Frankfurter, J.,dissenting). Nevertheless, if Section 2 asked courts to measure an inadequately defined phenomenon – electoral inequality – it did not leave judges entirely clueless. Some guidance was provided. This Court in *Whitcomb* unequivocally rejected the view of the trial court, 305 F. Supp. 1364 (S.D. Ind. 1969), that a showing of disproportionately low minority officeholding and evidence of black residential clustering would suffice to establish electoral discrimination. In lifting language directly from *Whitcomb* and *White*, Congress thus spurned the notion that black voters were entitled to legislative seats reserved for black representatives. Minority voters were guaranteed not their "fair share" of political offices, but only a "fair shake" – a chance to play the electoral game by fair rules.[3] In fact, the language of Section 2 – guaranteeing minority voters an equal opportunity "to elect representatives of their choice" – plainly suggested

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[3] The "fair share," "fair shake" distinction is taken from Blumstein, *Defining Discrimination: Intent v. Impact*, 16 New Perspectives 30 (Summer 1984); *see also* Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 Harv. L. Rev. 1315 (1986).

a definition of representation broader than that which would have been conveyed had the phrase read "*minority* representatives of their choice."

In addition, the concern was clearly with election contests in racist settings. Blacks, Congress concluded, lacked an equal chance to elect representatives of their choice where race had left them politically isolated – without potential allies in electoral contests. That focus was spelled out by numerous witnesses at the 1982 hearings and in the Senate Judiciary Committee Report as well. S. Rep. No. 417, 97 Cong., 2d Sess. (1982) (hereinafter "1982 Senate Report").

Thus, the 1982 Senate Report listed "factors" to which courts were instructed to refer in judging the merits of a vote dilution suit. They included a history of discrimination, racial polarization, a candidate slating process to which minorities were denied access, political campaigns characterized by racial appeals, and a lack of responsiveness on the part of public officials to minority interests. 1982 Senate Report at 28-29; Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 192-197 (1987). The point of the list was clear: to help judges identify those situations in which either a history of discrimination or ongoing racism had left minority voters at a distinct disadvantage in the electoral process. Not only the list, but other language in the Report signalled the importance of past and present racism. The concern, the report noted, was with those exceptional

communities in which racial politics still dominated the electoral process." 1982 Senate Report at 32.[4]

That was the message as well of a number of civil rights advocates who testified at the 1982 hearings. For instance, Armand Derfner, a leading civil rights attorney and key witness, argued that single-member districts had no "precisely correct racial mix." The entitlement was not to districts that were, say, two-thirds black. Section 2 only promised an electoral process that was fluid – open to racial change – not "frozen." Courts were expected to ask if minority voters would have "some influence." Claims of dilution would rest, Derfner said, on "evidence that voters of a racial minority [were] isolated within a political system . . . 'shut out,' i.e. denied access . . . [without] the opportunity to participate in the electoral process." Voting Rights Act: Hearings on S. 1992 Before the Subcommittee on the Constitution of the Committee on the Judiciary, U.S. Senate, 97th Cong., 2d Sess. at 803 and 810

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[4] The 1982 Senate Report also cited a South Carolina district court decision in *McCain v. Lybrand*, D.S.C. No 74-281 (April 17, 1980), as an illustration of the faithful application of the already familiar "results" test. The plaintiffs had prevailed in that decision because black candidates, the court found, tended to lose elections "not on their merits but solely because of their race." A report issued by the Subcommittee on the Constitution to the Senate Committee on the Judiciary expressed concern that precisely that distinction would be lost. Not so, retorted the full committee's own report. In "most" jurisdictions white voters give substantial support to black candidates. But "unfortunately . . . there are still some communities . . . where racial politics do dominate the electoral process." 1982 Senate Report at 33. And in such communities "a particular election method can deny minority voters equal opportunities to participate meaningfully in elections." *Id.*

(testimony of Armand Derfner) (1982) (hereinafter "Senate Hearings").

When were minorities "frozen" out, however? No witness offered a definition of that total electoral exclusion against which the Act protected, except to say that the test had been met when a group had "really been unfairly throttled."[5] "Unfairly throttled" by racism, the 1982 Senate Report – and the entire history of the Act – made clear.

Some will argue that an interpretation of Section 2 that makes racist exclusion the test of electoral discrimination is at odds with the stated aim of those who amended the statute in 1982. Not at all. The objection in 1982 to the decision in *Mobile v. Bolden*, 446 U.S. 55 (1980), was to the demand that plaintiffs produce a "smoking gun." Advocates did not object, in other words, to the focus on racism, but only to this Court's alleged insistence on direct evidence of racist intent.

In sum, in revising Section 2, Congress unequivocally and properly rejected the notion of group entitlement to even one legislative seat – however concentrated or dispersed black residential patterns were found to be.[6] Had witnesses at the 1982 congressional hearings lobbied for an amended statute that would encourage race-based districting and thus guarantee legislative seats for members of designated minority groups, their arguments

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[5] 1982 Senate Hearings at 803.

[6] Residential patterns are relevant only to the availability of a remedy once a Section 2 violation is found. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

would have certainly fallen on deaf ears. Such a demand was not even remotely possible politically.

3. Arguably Section 5 did necessitate retaining District 18 as majority-black, but even that case is not clear.

District 18 has been sending an African-American to Congress since 1971; it has become a safe black seat, and thus a districting plan that invites white candidacies by providing for a black population concentration under 50 percent would have arguably constituted retrogression in violation of Section 5. On the other hand, in the 1980s District 18 had lost black residents and gained Hispanics. *Vera*, 861 F. Supp. at 1315, 1323. Texas mapmakers were not content to maintain the district as majority-minority, however. They insisted on a constituency that was safely black, and in dividing the black and Hispanic populations into separate racially-identifiable districts, they created lines

> so tortuously drawn that an 8 1/2 x 11" map does not begin to show their block-by-block district lines. . . . The districts literally meander from one side of the street to the other and cross major thoroughfares. . . . The boundaries [became] so complex that the county clerk's office sent the wrong ballots to certain precincts and erroneously counted those votes with District 18. *Vera*, 861 F. Supp. at 1340.

Whether Section 5 demands that a majority-minority district must be kept racially pure – in this case, black – is doubtful, especially when the district lines end up chasing residentially dispersed voters, with the consequence

that a tortured configuration is drawn and voters are left "confused and frustrated." *Id.* at 1340.[7]

C. In misreading the Voting Rights Act, Texas took its cue from the Justice Department, whose interpretation of the statute has long been at odds with the legislation itself.

Texas read the Voting Rights Act as the Justice Department had long urged. Its understanding of the legislation rested squarely on a misunderstanding, but one that had been carefully crafted by the federal government.

The voting section of the Justice Department's Civil Rights Division has assumed freewheeling power to object to districting plans that did not seem "right" – racially "fair" – since at least 1980.[8] In theory, federal attorneys act in a quasi-judicial role. The legal standards they use to enforce the statute should track those that this Court has developed. In practice, however, maximization

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[7] Nor can it legitimately be argued that Section 5 incorporates the legal standards contained in Section 2. The two provisions are distinct. As the District Court for the District of Columbia has recently explained at length in two important decisions, Section 2 cannot be viewed as part of the preclearance provision; the one was never "incorporated" into the other. *New York v. United States*, 874 F. Supp. 394, 397-98 (1994); *Georgia v. Reno*, 881 F. Supp. 7, 12 (1995). The Department's guidelines erroneously state otherwise. Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R., § 51.55 (b)(2).

[8] This criticism is developed in detail in Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 157-191 (1987).

became the test of racial fairness by which the Justice Department routinely judged districting plans.[9] Thus, the New Orleans plan approved by this Court in *Beer v. United States*, 425 U.S. 130 (1976), would not now pass administrative review; what this Court precleared, the Justice Department will not.

It is of vital importance that this Court once again give clear guidance as to the legal standards contained in Sections 5 and 2; without such guidance, the Justice Department has *carte blanche* to insist that jurisdictions follow its dictates or come to Washington to defend their actions. The Voting Rights Act fundamentally altered traditional federal-state relations. Though the reasons for doing so were compelling, the attendant power should be exercised in a manner mindful of the potentially sweeping impact on local self-governance. Federal intrusion on constitutionally sanctioned local prerogatives is all the greater when the legal boundaries are unclear and decisions are made on the basis of seeming administrative whim.

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[9] During the Bush Administration, the obligation to draw a maximum number of majority-minority districts became no secret. The assistant attorney general for civil rights regularly insisted that minority voters were entitled to their "fair share" of political power. *See, e.g.*, Mr. Dunne's speech to the American Bar Association, Atlanta, Georgia, August 10, 1991, *cited in* Thernstrom, *Shaw v. Reno: Notes From a Political Thicket*, Public Interest Law Review 1994 at 39. There is literally no disagreement, across the political spectrum, that the Act came to require, in the view of the Justice Department, the creation of majority-black single-member districts wherever possible. Indeed, the question has now become the limits and wisdom of that strategy. *See, e.g.*, Guinier, *The Tyranny of the Majority* (1994).

II. THIS COURT'S RESOLUTION OF THESE STATUTORY ISSUES CARRIES PROFOUND CONSEQUENCES FOR OUR FUTURE AS A MULTIRACIAL, MULTIETHNIC SOCIETY.

Districts 18, 29, and 30 are racial classifications for familiar affirmative action ends.[10] The point of Texas' race-conscious districting was precisely that of most affirmative action policies: to provide maximum protection for minority candidates from white competition. Law school affirmative action programs, by setting separate admissions standards, pit black and Hispanic applicants primarily (sometimes only) against other members of the racial group. Likewise, "safe" black and Hispanic legislative districts amount to protective racial sorting. Their point is to ensure electoral contests in which minority candidates compete only against other minority candidates, eliminating potential white competitors.

Questions involving affirmative action in the electoral sphere are not simply about who ends up where in a districting map. They go to the very heart of how we see ourselves as a multiracial, multiethnic nation. At issue between the opposing sides in this case are quite different views of American society, the place of blacks in it, its openness to change, the nature of democratic representation, and the costs of race-conscious policies. This Court's decision will shape our future in far-reaching ways.

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[10] By "affirmative action," we mean race-conscious action to secure equal outcomes for certain designated groups.

A. Affirmative action policies are unnecessary and quite possibly counterproductive in the electoral sphere.

1. The premise that minority candidates can get elected in majority-white settings only very rarely and under exceptional circumstances is not supported by the evidence. Neither black nor Hispanic officeholding depends upon majority-minority constituencies; whites vote for black and Hispanic candidates.

"[T]he existence of racially polarized voting in [Harris and Dallas] counties is established by overwhelming evidence of which the Legislature was well aware," the Brief for the Rev. William Lawson (at 49) states. The doors of political opportunity are still closed, appellants argue. Black and Hispanic candidates remain at the mercy of racist white opposition. Hence the need for protective policies – for race-based districts drawn to ensure black officeholding, which appellants argue is an implicit statutory promise.

This assessment of both the American racial landscape in general and that of Texas in particular is not only bleak but wrong. There is general agreement that from the outset the Voting Rights Act promised more than simple access to the polling booth. The architects of the statute clearly expected that black ballots would mean black power. Not just black political influence, but blacks elected to public office. But, whatever their initial validity, in 1995 such extraordinary protective policies as the deliberate creation of safe black districts are not necessary.

Whites not only say they will vote for black candidates; they do so, often casting their ballots for an African-American running against a white opponent. That choice is most often available in mayoral contests. Conventional wisdom has it that the overwhelming majority of black mayors have been elected from majority-black cities. This is true but misleading. Most of those black "cities" are in fact tiny majority-black towns in the South. Eliminate those small urban dots on the southern map, focus on cities of 50,000 or more in population, and quite a different picture emerges. A large majority of the black mayors elected in such cities over the last 30 years have not had the benefit of a majority-black constituency.[11]

It is not only in races for a mayor's seat that white voters choose black candidates over those who are white. L. Douglas Wilder, in his successful gubernatorial run in 1989, got an estimated 40 to 43 percent of Virginia's white vote. Skeptics will say that figure still represents only a minority of the white electorate, but Charles Robb, the white Democratic governor who preceded Wilder, did only a shade better – 45 percent. Illinois (11.6 percent black) elected Carol Moseley-Braun as its U.S. Senator in 1992. In 1994, Ohio elected J. Kenneth Blackwell as state treasurer and New York chose H. Carl McCall as state comptroller. Also in 1994, J.C. Watts won a congressional seat in an 83 percent white Oklahoma district. This is not

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[11] *See* Thernstrom and Thernstrom, "The Promise of Racial Equality," in *The New Promise of American Life* (Alexander and Finn, eds. 1995). However, while the essay asserts that 83 percent of black mayors elected in cities over 50,000 in population have not had the benefit of a majority-black constituency, a recalculation suggests the figure should have been 66.7 percent.

a new phenomenon. Andrew Young was elected to Congress in 1972 from Georgia's fifth district, which was then majority-white.

2. There is no credible evidence that minority candidates cannot get elected from majority-white districts in Texas.

Appellants' briefs all argue that whites usually vote as a bloc against black and Hispanic candidates. *See, e.g.*, Brief for the Rev. William Lawson at 51. The Brief for the United States (at 3) notes that "[n]o district in Texas with a majority of white residents has ever elected a black member to Congress." Hence the need for safe minority constituencies.

In fact, for four reasons, that record is not telling. First, white voters in Texas have helped elect blacks and Hispanics to a variety of offices; there is no reason to believe a congressional seat is out of bounds. For example, the current Attorney General for the State of Texas is Hispanic. In both Houston and Dallas, white voters have elected Hispanics in at-large elections to the city council and the school board, as well as for judicial positions. In May 1995, Ron Kirk, an African-American who had served as Texas Governor Ann Richards' secretary of state, took the mayor's seat in Dallas. Approximately 40 percent of white voters cast their ballots for Kirk, who won with 60 percent of the total vote. The coalition that swept him into office was white and black. (Hispanics supported an Hispanic candidate.) Moreover, white real estate developers and other Anglos prominent in the business community turned their back on the candidacy

of a white lawyer and poured money into Kirk's campaign.[12]

Second, the past is not the future. White racial attitudes have been changing fast, and the record of black and Hispanic electoral success in 1975 tells us little about the prospects for such success in 1995. Third, black candidates cannot win contests they do not enter. And scholars attempting to assess white willingness to support minority candidacies on the basis of election returns cannot learn anything from Texas elections in which no black or Hispanic candidate has been in the race. And finally, congressional candidates – whatever their color – cannot win elections if their political views are at odds with the majority of voters in their district. California Rep. Ronald V. Dellums gets elected from a constituency that includes Berkeley and like-minded suburbs, but few majority-white districts are as left-leaning as his. Particularly in the South, centrist and conservative candidates (whether white or black) will do better than those who are militantly liberal. J.C. Watts would not have been elected in Oklahoma had he run as a liberal Democrat.

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[12] Furthermore, in 1990, both political parties nominated black candidates to the Texas Court of Criminal Appeals. In 1988, Texas voters elected an Hispanic, Raul Gonzales, to the Texas Supreme Court. He received the third largest number of votes of any candidate on the ballot, following George Bush for President and Lloyd Bentsen for U.S. Senator.

3. The Voting Rights Act is a statute designed to protect minority voters, not black and Hispanic officeholders. Race-based districting does not necessarily protect minority voters.

Safe minority districts are a gift to minority politicians. But they are not necessarily in the interest of black or Hispanic voters – or, indeed, in the public interest. The Brief for the United States (at 7) notes that "[t]he black community in Dallas County believed a 50% black population district to be necessary. . . . " But aside from the irrelevance of such convictions to the Fourteenth Amendment question presented in this case, the reference to the "black community" is misleading. Clearly, that was the conviction of black politicians, who, like all elected officials, like to run in districts designed to be safe for them.

Whether majority-minority districts are advantageous to black and Hispanic voters is an open question, the answer to which depends in part on the context. In certain settings, a greater dispersion of black voters over more "influence districts" will mean better representation, since more public officials, both black and white, will owe their election in part to black support.

4. Affirmative action policies must be temporary, and subject to modification or curtailment when their remedial objectives are accomplished. But, once created, racially-gerrymandered districts will be far more difficult to root out.

Legislative districts that protect black (or Hispanic) candidates from white competition serve an affirmative action purpose. They are analogous to separate lists for black and white candidates for spots on a police force or seats in a medical school class. They differ, however, in a crucial respect. Preferential admissions and hiring policies are, in theory, temporary; their life will end, proponents argue, when such protective racial sorting is no longer necessary. That is not likely to be the case with racially gerrymandered legislative districts.

If such districts are allowed to stand, they are likely to be permanent. Considerations of incumbency and politics aside, in the covered jurisdictions of the South and elsewhere, the retrogression test of Section 5 forbids backsliding – which arguably means any decrease in the number of secure black legislative seats. Plans approved today most often become the absolute baselines against which subsequent districting changes are measured through at least 2007, when Section 5 is now scheduled to expire. *Johnson v. Miller*, 864 F. Supp. 1354, 1386 (S.D. Ga. 1994) ("any redistricting plan designed for proportionality, that is upheld by the Court today, will not be easily uprooted in the foreseeable future").

B. Proportional representation is the standard of racial fairness that runs through appellants' briefs. That standard assumes the necessity of protective racial sorting in a severely divided society. America is not such a society.

That in a racially fair political system blacks and Hispanics would hold office in proportion to their numbers in the population is a conviction that runs through all the briefs for appellants. *See, e.g.*, Brief for the United States at 15 "the failure to create a minority opportunity district would leave minority group members substantially underrepresented when compared to their percentage in the relevant population").

Disproportionately low-black officeholding denies representation to a group for whom members of no other group can speak, the argument for a proportionality standard implies. In severely divided societies, whites cannot speak for blacks, or (by logical extension) blacks for whites. Blacks – it is assumed – are a nation within our nation, a people apart. And as such, they are entitled, as a matter of elementary fairness, to representation in proportion to their population strength. And that entitlement holds whatever the residential patterns of the group in question; Hispanic suburbanization thus means districting plans that scoop up pockets of suburban Hispanic voters, who may have more in common with their white neighbors than with inner-city residents of any color.

The United States, however, is not such a society, and indeed as this Court has noted, such reasoning rests on "stereotypical assumptions the Equal Protection Clause forbids." *Miller v. Johnson*, 115 S.Ct. at 2481, 2487. The

view that "individuals of the same race share a single political interest" rests on the demeaning notion that minority group members think alike, "the precise use of race as a proxy the Constitution prohibits." *Id.*

1. The evidence does not support the view that blacks or Hispanics are a people apart, and our public law should not treat them as such.

In 1945, the novelist and social critic, Richard Wright, described his boyhood days in a South in which "whites had drawn a line over which we dared not step."[13] That South has disappeared, and the position of African-Americans within American society has been transformed. More than 80 percent of blacks polled in national surveys report having whites as neighbors.[14] Few whites say that they wouldn't want to live next door to a black family, although 30 percent object to having a Fundamentalist as a neighbor.[15] African-Americans are permanent and influential political players – in both North and South. They are partners in powerful law firms, and doctors at distinguished hospitals. An African-American model in an upscale Bloomingdale's clothing ad is now business as usual; as are black faces in TV commercials

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[13] Wright, *Black Boy* 251 (1945).

[14] Feigelman and Gorman, *Blacks Who Live Near Whites: 1982 and 1987*, Sociology and Social Research 202-207 (July 1990).

[15] Schuman, Steen, and Bobo, *Racial Attitudes in America: Trends and Interpretations* 106-107 (1985); *see also* Bates, *Battleground* 64 (1993) (citing 1989 Gallup Poll).

selling every sort of product. The Bill Cosby show, watched by 20 million viewers, earned NBC a billion dollars.

Both African-Americans and Hispanics still have incomes below the national average, are less likely than whites to have a college degree, have higher poverty rates, and rank behind whites in most measures of socio-economic status. But neither group is composed of a people apart. As the district court noted in *Johnson v. Miller*, 864 F. Supp. at 1390, "[b]lacks in Georgia did indeed rise from a common heritage of slavery and oppression, but with the shedding of those burdens they have begun to follow myriad, distinctive paths."

Blacks are clearly the more excluded of the two groups, but the historical picture has changed dramatically. Until the 1960s almost all of the small numbers of African-American students attending college were to be found in historically black institutions; today the number in higher education has grown explosively, and six out of seven of them attend predominantly white institutions. "Buy Black" campaigns routinely flop. Black separatist parties go nowhere. This picture could obviously be enlarged, but the point should be clear. The United States is not yet a fully integrated society, but it has moved in that direction with impressive speed in the four decades since *Brown v. Board of Educ.*, 347 U.S. 483 (1954). A separate and excluded people may be entitled to legislative set-asides, seats reserved to ensure their political inclusion. In 1995, not even blacks need such an extraordinarily protective arrangement.

2. The legal ratification of the notion of three societies – one white, one black and one Hispanic – may make it a self-fulfilling prophecy.

Neither African-Americans nor Hispanics are truly a people apart, a racially-defined nation within our nation. And yet if both they and whites believe they are, it may well become true. This is especially the case if that perception informs the law. Separate admissions procedures for whites and minorities, separate hiring processes, separate legislative districts: given a stamp of approval by Congress and this Court, they paint an official and influential portrait of American society.

The drive for proportionate racial and ethnic representation by means of race-based districting is informed by unwarranted pessimism, which if embodied in law threatens to do far more harm than good.

3. The deliberate gerrymandering of majority-minority districts cannot, in any case, be justified.

Congressional races take place within the confines of geographically-based single-member districts. Racially gerrymandered constituencies are an attempt to provide minorities, and only minorities, with a means to circumvent the constraints within which members of all other groups must work. *See* Butler, *Affirmative Racial Gerrymandering, supra*. To impute to Congress an intent to permanently remove two groups from the pluralism of American politics not only misreads the basic objectives

of the Voting Rights Act, but would ensure the very segregation the Act was intended to cure.

C. Racial classifications are dangerous to everyone. The harm is to whites, blacks and Hispanics alike.

Racial classifications deliver the message that skin color matters – profoundly. They suggest that white folks and black folks are just not the same, that race and ethnicity are the qualities that really matter. They imply that individuals are defined by blood – not by character, social class, religious sentiments, age, or education. But categories appropriate to a caste system are a poor basis on which to build that community of equal citizens upon which democratic government depends. Equal citizens are free to define themselves, and do so differently in different contexts. A voter whose choice of a candidate in a presidential primary is shaped primarily by racial considerations might react to the issues in a school board contest as parents of other races do. It is precisely that fluidity of individual political identity that prevents the formation of castes, which are rigid and hierarchical by nature.

"The destinies of the two races, in this country, are indissolubly linked together . . . ," Justice Harlan wisely noted in his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).[16] It is obviously the case.

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[16] On Harlan's dissent and the history of the color-blind idea, *see* Kull, *The Color-Blind Constitution* (1992).

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UTE FOR JUSTICE
IAM H. MELLOR III
BOLICK
G. BULLOCK
Pennsylvania Avenue, NW
200 South
ington, DC 20004
457-4240
sel for Amicus Curiae